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In the Supreme Court of the United States

OCTOBER TERM, 1990

SALSBURY INDUSTRIES, *Petitioner*,

v.

UNITED STATES, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

Salsbury's petition explains how the decision of the Court of Appeals runs roughshod over several of this Court's recent precedents, disregards the purpose of the Postal Reorganization Act, and conflicts with a long list of federal and state cases involving the impossibility defense. Given the size of the Postal Service's business, the need it and all other government agencies and instrumentalities have to enter into contracts with private sector firms for goods and services, and the fact that the unsettling effect of the decision below (which is not confined to the Postal Service) will lead to increased costs as noted in the *amicus* brief filed by North American, the case strongly merits plenary review.

The thrust of respondent's opposition is not so much that the case does not meet the standard for granting review, as

that the decision below was correct. While the petition addressed the merits sufficiently to show the contrary, several of respondent's points demonstrate even more clearly the need for review by this Court. Ironically, the more respondent stresses that the Postal Service is, "for purposes of contracting," Opp. 6, no different from any other federal agency or instrumentality, the broader the impact of the decision below, and the more compelling the need for correction by this Court.

1. Respondent continues to resist the fact that Congress launched the Postal Service into the commercial world a generation ago. Thus, it attempts to argue that Congress's effort, which fundamentally transformed the entity responsible for the Nation's postal system, was in fact a narrow one, and that rulings such as *Loeffler v. Frank*, 486 U.S. 549 (1988), are properly confined to the precise issue presented (*e.g.*, prejudgment interest), rather than evincing a broader principle. So cramped a reading of the Postal Reorganization Act has no basis in the statute or the cases construing it. The extent to which the Postal Service is subject to private sector rules of law is being fleshed out, *e.g., compare Allied Coin Investment, Inc. v. U.S. Postal Service*, 673 F. Supp. 982 (D. Minn. 1987) (FTCA), *with Miller v. Gould*, Civ. No. 89-C-5676 (N.D. Ill. May 16, 1990) (available Nov. 22, 1990, on LEXIS, Genfed library, Newer file) (RICO), but the approach taken in the opposition indicates that the broader principle needs to be underscored.

Respondent seeks to blunt the force of our argument that the decision below confers an unwarranted competitive advantage on the Postal Service with a theory that the Service has competitors as to certain of its activities as a matter of its own choice. There are three difficulties with this. First, it matters not *how* the Postal Service happens to have acquired competitors, *i.e.*, as a matter of congressional action or as a matter of Postal Service discretion. The fact is that, clearly, it does compete with the private sector. For example, its latest

annual report states: "the Postal Service is seeing increased competition for its 'bread-and-butter' business--the delivery of hard-copy communications--from private alternative delivery firms, FAX machines and other emerging electronic technology." Ann. Rep. of U.S. Postal Service, Fiscal Year 1989 15 (1990). Second, Postal Service contracting is the same regardless of whether the goods to be acquired relate to a field in which it has voluntarily subjected itself to competition. Third, the only areas in which the Postal Service can even claim to have voluntarily opened the door to competition are those in which it has a statutory monopoly. It enjoys no such monopoly over lockbox rentals, the aspect of its business out of which this case emerges.

2. The core of respondent's defense of the Court of Appeals' decision is that Salsbury has nothing to complain about because its contract incorporated a standard termination for convenience clause from the Postal Contracting Manual. Opp. 7-8. Passing over the question of how negotiable such a clause is as a practical matter, or the application of the doctrine of *contra proferentum* in the circumstances, *see United States v. Seckinger*, 397 U.S. 203, 210 & n.14 (1970), respondent's argument is untenable. As Judge Duff correctly observed of the decision below, by "ending its analysis with the words of the parties' contract, [it] fails to give full consideration to what the parties intended." Pet. App. 9a. This is because the clause "carries a jurisprudence which shades its meaning." *Id.*

a. Salsbury's contract was awarded on January 28, 1983. Its understanding of what the clause meant must be judged as of that date. *United States ex rel. von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535 (1866); 4 S. Williston & W. Jaeger, *Williston on Contracts* § 615 (3d ed. 1961). The Postal Service had been "launched into the commercial world," *Franchise Tax Board of California v. U.S. Postal Service*, 467 U.S. 512, 520 (1984), more than a decade earlier. The law could not have been clearer that a party responsible for a judicial decree interfering with its own ability to perform has

no defense of impossibility. Given the Court of Appeals' holding that the *Doninger* injunction *compelled* termination of Salsbury's contract, Pet. App. 8a, the posture in which the Postal Service found itself as a result of Judge Gasch's decision was precisely that of one whose performance has been interfered with by an intervening judicial decree caused by his own misdeeds. In 1983, normal rules of contract law fit this situation like a glove, and the Postal Reorganization Act gave Salsbury every reason to believe that those normal rules would govern.

b. In contrast, *until this case*, no court had ever held that a termination for convenience clause extends to an agency or instrumentality's failure to perform because of an intervening judicial decree, much less one that is its own fault. Notwithstanding the majority's claim that "*Torncello* [*v. United States*, 231 Ct. Cl. 20, 681 F.2d 756 (1982)] has nothing to do with this case," Pet. App. 6a, that *en banc* decision, handed down before Salsbury's contract was awarded, carefully and critically surveyed the history of the clause and unmistakably indicated that there were significant limits to its application. Judge Duff's dissent fairly describes *Torncello*'s effect on the clause as the law stood prior to the decision below. Pet. App. 9a-11a. To the extent that the majority, in 1990, retrofitted a narrow interpretation onto their predecessor court's 1982 decision, that interpretation cannot in fairness be applied to Salsbury. Looking, therefore, at the actual historic use of the clause and the limited reading signalled by *Torncello*, the courts below changed the rules on Salsbury. "Contracting parties are not required to foresee changes in the governing law." *Vollmar v. CSX Transportation, Inc.*, 705 F. Supp. 1154, 1175 (E.D. Va. 1989), *aff'd on other grounds*, 898 F.2d 413 (4th Cir. 1990).

c. Under respondent's interpretation, settled law governing cases in which performance is said to have been rendered impossible by an intervening judicial decree was supplanted *sub silentio* by a rule granting the buyer's contracting officer unfet-

tered discretion to terminate for convenience rather than treat the situation (in accordance with its substance) as a breach for which her employer must pay damages. The critical element is that this choice would be left in the hands of the very party whose misconduct led to the decree in the first place. Since it is improbable that anyone would knowingly accept a contract that included so irresistible an invitation to future self-help by a wrongdoer, respondent's interpretation cannot be imputed to Salsbury without clear evidence that Salsbury was on notice of it. If, as this Court held in *United States v. Seckinger, supra*, at 211 & n.15, a court should be "firmly convinced" that the parties so intended before construing a government contract to permit an indemnitee to recover for it own *negligence*, then *a fortiori* such a showing should be required where the agency or instrumentality's judicially-found *affirmative misconduct* creates the impediment to performance. It is not Salsbury's contention (although we have our doubts) that a seller would *never* knowingly confer such unilateral power on a buyer. It is simply that Salsbury had no reason to believe, given the state of the law on January 28, 1983, that it had done so.

In light of these considerations and the rule that contractual interpretations that are unfair and unjust are disfavored, *Noonan v. Bradley*, 76 U.S. (9 Wall.) 394, 407 (1870), it "strains credulity" that Salsbury "should have known," *cf. Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 25 (1981) (lack of clear notice of conditions on participation in federal grant program), when it received its contract that it was signing over to the Postal Service the right to avoid damages for breach in circumstances to which the termination for convenience clause had never before been applied and where settled common law rules bar a defense of impossibility.

3. Respondent refers to the Postal Service's "*alleged* bad faith," Opp. 5 (emphasis added), as if there were some question about it, and claims that the courts below determined that the Postal Service entered into the Salsbury contract

"with every intention of honoring it." *Id.* 9. Neither observation is apt.

a. There is nothing "alleged" about the Postal Service's bad faith. Judge Gasch's decision concluded with the observation that there is "a strong public interest in preserving the integrity and good faith of those involved in the procurement process," Pet. App. 54a, the contracting officer admitted that that decision called into question the Postal Service's good faith, and respondent's pretrial submission in the Claims Court expressly conceded that Judge Gasch found that the Postal Service acted in bad faith in excluding Doninger from the procurement.

b. As for respondent's claim that the courts below determined that the Postal Service entered into the contract "with every intention of honoring it," what they actually said is that the Postal Service did not subjectively anticipate the *Doninger* injunction. Pet. App. 8a, 41a. This misconceives the issue, which is not confined to actual subjective expectations but extends to what a party had reason to know. *E.g., Vollmar v. CSX Transportation, Inc., supra*, 705 F. Supp. at 1176; *Morin Building Products Co., Inc. v. Volk Construction, Inc.*, 500 F. Supp. 82, 89 (D. Mont. 1980) (problems encountered "were or should have been contemplated" at time contract was formed); Pet. 24. "[B]ecause the purpose of a contract is to place the reasonable risk of performance on the promisor, he is presumed, in the absence of evidence to the contrary, to have agreed to bear any loss occasioned by an event which was foreseeable at the time of contracting." *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 991-92 (5th Cir. 1976).

Even if foreseeability is not an absolute bar to the defense, *see Opera Co. of Boston v. Wolf Trap Foundation for Performing Arts*, 817 F.2d 1094, 1102 & n.14 (4th Cir. 1987), where neither party is at fault, it remains "in the end a question of *how* unexpected at the time [the contract was made] was the event which prevented performance." *Compan-*

hia de Navegacao Lloyd Brasileiro v. C.G. Blake Co., 34 F.2d 616, 619 (2d Cir. 1929) (L. Hand, J.) (emphasis added), *quoted with approval in Wolf Trap, supra,* at 1101. But surely *any* degree of foreseeability is fatal where the party asserting impossibility as a defense is to blame for the injunction behind which it seeks to take shelter. At the very least, a high degree of *im*probability of occurrence should be required in order to invoke the defense in such cases.

The Postal Service cannot meet even the least exacting of these formulations. As Judge Duff noted, it may not have actually anticipated what happened, since it was always possible that Doninger, as a long-time postal contractor, would not make an issue of its illegal treatment or, lacking resources, could not have carried a bid protest case through to judgment, or that the court hearing the bid protest case would fashion some remedy that would not have interfered with Salsbury's contract. "Having knowingly and improperly disqualified a company with Doninger's experience, the contracting officer had to have known that the Postal Service would get caught." Pet. App. 12a. "[T]he contracting officer must have foreseen the risk that once the Postal Service was caught, any contract tainted by its misconduct would be in jeopardy." *Id.* Judge Duff's assessment is unanswerable and amply shows that the facts known (only) to the Postal Service at the time of contracting made it not at all improbable that a district court would be called upon to, and would in fact, grant relief in a bid protest action.

4. Not content to argue that the Postal Service's failure to take affirmative measures to avert the effect of the *Doninger* injunction is irrelevant, respondent suggests (at 9) a public policy/judicial economy reason for excusing that failure. It is true that that failure need not be reached in order for Salsbury to prevail on the merits as even zealous efforts to avert or overturn an injunction do not permit a party in the Postal Service's position to invoke the defense of impossibility since the injunction was occasioned solely by its own miscon-

duct. This independently renders the defense inapplicable. In other words, the failure to take affirmative measures to avert the effect of the decree may in this particular case be *redundant*, but it is hardly *irrelevant*.

Respondent's further suggestion that the rule for which we argue would force litigants in the Postal Service's position to press "unwarranted" appeals is equally fallacious because (in addition to overlooking the fact that the Postal Service would not have had a defense of impossibility even if it had pursued its appeal) it disregards the alternatives of settling with the bid protester or, as Salsbury asked, simply paying damages for breach of the interfered-with contract. Ethical standards and the prospect of sanctions for the filing of frivolous appeals afford whatever additional protection is needed against the problem imagined by respondent.

5. Despite respondent's effort (at 8-9) to finesse the majority's view that it was "significant[]" that Salsbury did not intervene in the *Doninger* litigation, Judge Mayer's opinion makes it abundantly clear that he and Chief Judge Markey thought it more than an interesting historical fact, to be mentioned *en passant*, that Salsbury was not involved in the *Doninger* case. Pet. App. 7a. The fact that the courts below did not *in haec verba* find Salsbury bound by the *Doninger* injunction is no answer to our contention that the decision below violates *Martin v. Wilks*, 109 S. Ct. 2180 (1989). Sustaining the termination of Salsbury's contract on the basis that the contracting officer only did what she had to do under the *Doninger* injunction, Pet. App. 8a, permits the Postal Service, as a practical matter, to treat Salsbury exactly as if it were directly bound by that injunction.

6. Finally, it is entirely irrelevant (Opp. 10, Pet. App. 7a) that Salsbury was paid nearly $5 million before its contract was terminated. The contract called for more, and Salsbury's damages properly include the additional incentives it was prevented from earning.

CONCLUSION

For the foregoing reasons and those previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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